

FORM DS-329
12-27-50 DEPARTMENT OF STATE A/CDC/MR OUTGOING AIRGRAM

REVIEWED BY *[Signature]*

DATE *9-30-82*

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AMEMBASSY,

TOKYO.

A-49 May 21, 1952

Subject: FCN treaty discussions; despatch No. 1 of April 30, enclosing copies of the memoranda of the 4th, 6th, 7th, 8th, 9th, and 10th informal meetings.

The Department believes it might be well at this point to elaborate upon the statement made at the middle of page 9 in its A-439 of December 31, concerning the ad referendum nature of the present discussions, and the referral to the Department of questions of interpretation. Interpretations given by representatives of the Embassy cannot be considered authoritative unless pursuant to Department instructions or approved by the Department. In the press of discussion, Embassy representatives have at times tended to give extemporaneous interpretations of the meaning of various passages which cannot be concurred in by the Department; and, accordingly, at the risk of stating the obvious, the Department wishes to emphasize that great care should be taken to avoid leaving the Japanese with an erroneous impression of the interpretation or significance of any provisions. Since it will be possible in the course of further meetings with the Japanese to correct any existing misimpressions, the agreed memoranda of conversation covering both past and future meetings can be made to represent a true and correct record of the views of the United States Government.

In its previous airgrams and telegrams, the Department has called attention, either directly or indirectly, to statements or implications which appear inaccurate, or which might be misleading or insufficient, and will endeavor to continue to do so in future communications, in order that the Embassy may be kept as fully informed as possible and

have

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have the material needed to make corrections and clarifications. Meanwhile the Department ventures to suggest that Embassy representatives exercise caution in giving explanations and statements of intended meaning, except as based on instructions, in order to avoid possible embarrassment and misunderstanding. Many unanticipated questions can arise during the discussions in view of the nature and complexity of the provisions of the treaty and the differences in the approach and attitudes of different foreign negotiators. It is unfortunately not possible to furnish the Embassy with an exhaustive set of advance answers on all conceivable questions, and this inevitable situation must be endured even at the cost of slowing the pace of the discussions.

There follow comments on the memoranda transmitted under cover of reference despatch.

ENCLOSURE No. I

Article VII. The Department thinks that the Embassy representatives did a very good job of guiding the discussion of this critical article. However, the statement concerning subsidies in the paragraph at the top of page 7 of Enclosure I requires some clarification. In proposing national treatment standards, the Department has intended to provide a rule which, in effect, assures legal equality of competitive conditions. This equality could be seriously undercut if the domestic firm were granted government subsidies which were denied to a foreign competitor of the same class and circumstances, established within the country. (It is the Department's view that this Government's policy with respect to shipbuilding subsidies is not in violation of this principle since the subsidies are granted not to shipbuilders but to United States shipping, a category of enterprise which is subject to reservation with respect to national treatment under paragraph 2 of Article VII.)

It appears now that it might become expedient to agree, in principle, to the Japanese suggestion that the article be restated in the model of the Colombia treaty. The Embassy is, therefore, authorized at its discretion to agree to a Japanese proposal to this effect. However, if this were done, the Department would wish the reference to "financial" activities restored; and correspondingly, the exception regarding financial and insurance activities deleted from clause (b) of paragraph 2. Moreover, the cross-reference in paragraph 4 should be to paragraph 3 rather than paragraph 1, in as

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much as the rule of paragraph 4 relates to paragraph 3. Furthermore, since the Japanese have inserted reference to scientific, educational, religious and philanthropic activities, the first sentence of paragraph 3 of Article VIII would become unnecessary. Finally, Department wishes the word "professional" inserted in the recitation, and paragraph 2 of Article VIII correspondingly deleted. This would complete the remodeling along the Colombia treaty lines.

Mr. Otabe is incorrect in supposing that the U.S. reservation for banking is based on the reason he alleges. The reservation has to do with receiving and keeping custody of deposits from the public at large; that is, the safekeeping of other people's money, a function of particular trust. It does not have to do with the lending activities of a bank; and the Department does not feel that a reservation is either appropriate or necessary as to a bank's lending its own money.

The Department would not object to entering a reservation for gas and electric companies, in as much as these are public utilities of a class with certain exceptions already suggested in the Department's original proposals (i.e., communications, air transport and hydro-electrical power development in the first sentence of paragraph 2 of Article VII). The Department would also be prepared to enter a reservation on ship-building, in as much as ship-building tends to be considerably affected with the national interest these days.

It appears that the Japanese have in mind entering qualifications for what is known as the "screening" of foreign investments. This is a subject which has been much debated within the U.S. Government, and in negotiations with certain foreign governments. Mr. Setser, who is thoroughly familiar with this subject and its various ramifications, will be able to explore it in some detail when he calls at Tokyo.

Enclosure No. 2

Article IX. As to the statement concerning U.S. law with respect to alien participation in mining enterprises (antepenultimate paragraph on page 2), it may be stated that Federal law permits full alien control of domestic companies engaged in exploiting mineral resources on the Federal domain, on a reciprocity basis (30 U.S.C. 161), and

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that the laws of many States do not prevent alien control of mining companies. The picture varies from State to State.

With reference to Mr. Otabe's statement concerning the ITO Charter on page 3, the following should be said. The fact that the cited passage was included in Article 12 of that now defunct document is in no sense to be considered as setting a precedent relevant to the U.S. position in its bilateral treaties. This passage was included as a mere restatement of the undoubted sovereign right of each country in the premises, if it cares to exercise it, without any way implying that each country would not have also the further sovereign right to make more positive international commitments. The U.S. agreed to this material in the ITO Charter, on a least common denominator basis, in the interest of achieving harmony among a great number of nations, having a wide diversity of viewpoints, which could not at that time agree on a more advanced multilateral investment convention. It should not be overlooked that paragraphs 1 (d) and 2 (b) of Article 12 of the Charter envisage the making of bilateral agreements providing greater assurances for foreign investment. It may be considered that the U.S. Government proposes the treaty of friendship, commerce and navigation to implement the important principle visualized by these clauses.

As to the discussion on the bottom of page 3 concerning the transfer of title to vessels, it may be noted that the provisions of paragraph 4 of Article IX are drafted in such manner as to allow each country to regulate or prohibit transfer of its national vessels to foreign ownership. (This is necessary, indeed, in order to make the treaty consistent with U.S. law). This results from the fact that neither Article VII nor any other article provides a treaty right for nationals of either Party to operate shipping under the flag of the other Party. Article VII, paragraph 2, makes a specific exception as to shipping enterprises (i.e., the reference to "water transport").

Article I. Mr. Otabe's proposal for adding the phrase "upon complying with the laws and regulations with respect to registration and other formalities" would, as suggested by the Embassy representative,

be unnecessary

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be unnecessary and redundant. This follows from the fact that the phrase "national treatment and most-favored-nation treatment" is an abridged statement of the fuller statements of these standards used in the Italian model. Compliance with applicable laws and regulations that must be complied with equally by nationals of the country or other foreigners in similar circumstances, as the case may be, is implied in every reference to national and most-favored-nation treatment in the treaty; and there is no more reason for elaborating on this point in connection with Article X than there is in connection with any other provision of the treaty making reference to these standards of treatment. The terms are, of course, defined in paragraphs 1 and 2 of Article XXII. See also the clarification added to the definition given in Article XXIV, paragraph 1, of the treaty with Greece.

Department's comments on the remaining enclosure to reference despatch will be forwarded in a separate airgram.

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